IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 266.

GLENN R. BOTHWELL, PLAINTIFF IN ERROR,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

SUPPLEMENTAL BRIEF.

Plaintiff in error asks leave of the court to file the following supplemental brief and additional list of authorities.

Defendants in error suggest that plaintiff is estopped from challenging the sufficiency of the proof of settlement and reclamation made by him to the agent of the State Land Board in May, 1909, and in support of such contention cites a number of the decisions of this court, which announced the well-settled doctrine that:

> "One who by his acts or representations, or by his silence when he ought to speak intends or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial."

This principle of law has no application to the facts of this case, because plaintiff in error, in submitting his proof of settlement and reclamation in May, 1909, was only doing what the State statute and the rules and regulations of the State Land Board required him to do in order to maintain his standing as a Carey entryman.

Section 19 of the act entitled, "An Act to Provide for a State Engineer, etc., and to Provide for the Acceptance by the State of Idaho from the United States of Certain Lands, and to Provide for the Reclamation, Occupation, and Disposal of the Same," approved March 2, 1899 (sec. 1628, Revised Code of 1908), *inter alia,* it provides:

> "Within one year after any person, association, or incorporated company authorized to construct irrigation works under the provisions of this act shall have notified the settlers under such works that they are prepared to furnish water under the terms of their contract with the State, the said settler shall cultivate and reclaim not less than 1/16 part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than ⅛ of the land filed upon, and within three years from the date of said notice the settler shall appear before the secretary of the board, a judge or clerk of the District Court or United States Circuit Court or Commissioner to be designated by the board within the State and make final proof of reclamation, settlement, or occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient in volume for the

complete irrigation and reclamation thereof, that he has been an actual settler thereon and has cultivated and irrigated not less than ⅛ part of said contract; and such further proof, if any, as may be required by the regulations of the Department of the Interior and the board. The officer taking this proof shall be entitled to receive a fee of two dollars, which fee shall be paid by the settler and shall be in addition to the price paid to the State for the land. All proofs so received shall be submitted by the secretary of the board, and shall be accompanied by the last and final payment for said land and upon approval of the same by the board they shall be forwarded to the Secretary of the Interior with a request that a patent to said lands be issued to the State," etc.

It will be observed that these State regulations required plaintiff to submit this proof some eighteen months before the State had caused an ample supply of water to be furnished in a substantial ditch or canal for the reclamation of these lands, but plaintiff could not be held for any default of the State or its construction company, in not having provided this ample supply of water, when it required him to make this proof.

"The mere fact that a complainant accepted and recorded a deed purporting to convey to it lands, the legal and equitable title to which were both, in fact, in the United States, does not estop it to maintain a suit in equity to enjoin the collection of taxes levied on said lands by the taxing officers of the county."

Clearwater Timber Co. *vs.* Nez Perce County, 155 Fed., 633, U. S. Circuit Court, District of Idaho, decided July 1, 1907.

Clearwater Timber Co. *vs.* Sho Shone County, 155 Fed., 612.

II.

The State Supreme Court (Tr., 27) has construed section 1653 of the Revised Code of Idaho as fixing the time at which a tax lien attaches against all taxable property within the State as noon of the second Monday in January of each year. The United States Circuit Court for the District of Idaho, in a recent decision, gives this section the same construction. It says:

> "Under such statutes, the status of property within the State for purposes of taxation is fixed on the second Monday in January, and that real estate exempt from taxation on the second Monday of January of any given year does not become subject to taxation during that year even though transferred to a person in whose hands it is no longer exempt under the law."
>
> Clearwater Timber Co. *vs.* Nez Perce County, 155 Fed., 633.

III.

In Wisconsin Central R. Co. *vs.* Price Co., 133 U. S., 496; 33 L. Ed., 687, Mr. Justice Field, speaking for the court, says:

> "When the Government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser and it does not exclude him from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land and the same shall be held subject to taxation as his property."

In Sioux City & St. P. R. Co. *vs.* The United States, 159 U. S., 349; 40 L. Ed., 177, Mr. Justice Harlan, speaking for the court, at page 364, said:

> "Another contention is that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit of the railroad company, the title vested absolutely in the company, and the lands were thereby freed from restraint or alienation from conditions subsequent or from liability to forfeiture."

In referring to the Price County case, *supra*, the court further says:

> "But these are cases, as an examination of them will show, in which the grant was directly to the railroad company or in which the act of Congress required that the patents for lands earned should be issued not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be issued to the State for the benefit of the company, *so that until the State disposed of lands the title was in it as trustee and not in the railroad company.*"

Among other cases, the opinion refers to Sioux City & St. P. R. Co. *vs.* Osceola County, 43 Iowa, 318, and continues:

> "In the case last mentioned the Sioux City company was relieved from the payment of taxes upon some of the lands patented to the State for its benefit upon the ground that the legal title was in the State, and the lands, for that reason, were not taxable."

It has been held in many cases that, where lands have been granted by Congress to the State to aid in the construction of internal improvements, with conditions annexed to the grant, that the issuance of patent by the State is the only competent evidence that the lands have been earned, and that such lands are not taxable until such patents have been issued.

> Iowa Falls & Sioux City R. Co. *vs.* Cherokee County, 37 Iowa, 438.

In Rice *vs.* The Minnesota & Northwestern R. R. Co., 1 Black, 358; 17 L. Ed., 147, it is held that:

> "Where Congress grants land to a State to be used in aiding the construction of an internal improvement a trust of power to dispose of the land for the purpose of carrying out the improvement is granted and no beneficial interest passes to the State."

To the same effect is

U. S. *vs.* Michigan, 190 U. S., 279; 47 L. Ed., 1103.

> "No taxes can be imposed upon the lands while they remain the property of the United States, nor upon lands granted by the United States to the State in trust for works of internal improvement and as to which the trust has not been executed."
>
> Central R. R. *vs.* Taylor County, 52 Wis., 37; 8th N. W., 833.

The rule with regard to when the Government has so far divested itself of title to public lands as to render them taxable has been frequently announced and applied in many of the State and Federal courts, and may be stated thus:

> "Before land granted or sold by the United States can be taxed by the State or other local taxing body as the property of the beneficial owner * * * a perfect equitable title must be vested and the consideration and other conditions of the grant or sale fully paid and performed. As long as the Government retains the legal title as security for any part of the purchase money or to secure the performance of other conditions of the grant or sale the land is not subject to taxation."
>
> Pitts *vs.* Clay, 27 Fed., 635.
>
> United States *vs.* Milwaukee, 100 Fed., 828.
>
> Clearwater Timber Co. *vs.* Shone County, 155 Fed., 612.

Mr. Justice Miller states the rule thus:

> "While we recognize the doctrine laid down by this court that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete and the equitable title is fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right."
>
> Kansas P. R. Co. *vs.* Prescott, 16 Wall., 603; 21 L. Ed., 373.

To the same effect are the following:

Union R. R. Co. *vs.* McShane, 22 Wall., 444; 22 L. Ed., 747.

Central Colorado Improvement Co. *vs.* Pueblo County, 95 U. S., 259; 24 L. Ed., 495.

Northern P. R. Co. *vs.* Traill County, 115 U. S., 600; 29 L. Ed., 477.

In State *vs.* Itasca Lumber Co., 100 Minn., 355; 111 N. W., 276, the rule is stated thus:

> "When the Government has no longer any right or interest in the property which would justify it in withholding the patent and the purchaser is in possession the latter will be treated as the beneficial owner * * * but before the land can be taxed by the State as the property of the beneficial owner a perfect equitable title must be vested and the consideration fully paid to the United States."

Under the laws of Idaho, as construed by numerous decisions of the Supreme Court of that State, public lands cannot be taxed while the title of the same remains vested in the State.

Article 7, section 4, of the State Constitution, provides:

> "The property of the United States, the State, counties, towns, cities, and other municipal corporations and public libraries shall be exempt from taxation."

"Lands belonging to the State are exempt from taxation and no title can be acquired to the same by a tax deed."

State *vs.* Stevenson, 6th Idaho, 367; 55 Pac., 886.

"Primarily title to all land in this country is in the Government, and until the Government has parted with the title it remains the property of the United States and as such is not subject to taxation."

Lane *vs.* Salisbury, 7th Idaho, 373; 63 Pac., 383.

"It must be considered that lands belonging to the Government are not assessable to any one so long as the title remains in the United States."

Inland Lumber Co. *vs.* Thompson, 11th Idaho, 522; 83 Pac., 933.

The findings of the Secretary of the Interior some eighteen months after the State had issued to plaintiff in error this instrument, which it termed final receipt, that the State had not complied with its contract and had not provided an ample supply of water in a substantial ditch or canal to reclaim these lands, is a final and conclusive judgment that the lands had not been reclaimed and that the recitals in the receipt to the effect that they had been, were untrue.

The subsequent completion of the works and the furnishing of an ample supply of water for their reclamation late in 1910 could not relate back to this certificate and make it effective for any purpose.

Hussmon *vs.* Durham, 165 U. S., 144; 41 L. Ed., 644.

State *vs.* Itasca Lumber Co., 100 Minn., 355.

The grant of lands made by Congress to the State was in trust for a specific purpose. By its terms the State was not authorized to lease said lands or otherwise dispose of them in any way whatever, except to secure their reclamation, cultivation, and settlement.

A lien was authorized to be created by the State, and by no other authority whatever, for the actual cost and necessary expense of reclamation and interest on such cost. The authority to create this lien necessarily implies that the State was prohibited from creating any other kind of a lien.

The time given the State for the execution of this trust was limited to ten years, after which the Secretary of the Interior was given discretionary power to extend for a period of five years by the act of March 3, 1901.

The lands were not reclaimed within the ten-year period given, and the entire segregation was subject to restoration at the time application for patent was made, late in December, 1910.

No proof of settlement or occupancy was ever made to the Government.

The proceeds derived by the State from the sale of these lands above the cost was to be a trust fund for the reclamation of other lands. No attempt to comply with this provision of the grant has ever been made.

The contract of segregation expressly provides that all of these lands are subject to contest by any person and in any United States land office where they may be situate at any time before the State has finally disposed of the same, upon the ground that such lands are not arid in character.

We respectfully submit that in view of all of the conditions in the grant that the State could not invest the plaintiff in error with a perfect indefeasible title to any of the lands in said grant, a title so perfect that nothing remained to be done, going to the foundation of plaintiff's interest, until the State had fully executed its trust by patenting these lands to the plaintiff, and that these lands were not subject to taxation by the State or any of its subdivisions on January 9, 1911.

Respectfully submitted by

WILLIAM A. LEE,
Attorney for Plaintiff in Error.

Residence, Blackfoot, Idaho.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 266

GLEN R. BOTHWELL, PLAINTIFF IN ERROR,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX-OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO.

In Error to the Supreme Court of the State of Idaho.

BRIEF FOR PLAINTIFF IN ERROR.

J. D. SKEEN,
WILLIAM H. WILKINS,
Residence: Salt Lake City, Utah.

WILLIAM A. LEE,
Residence: Blackfoot, Idaho.
Attorneys for Plaintiff in Error.

EDWARD B. CRITCHLOW,
Of Counsel. Residence: Salt Lake City, Utah.

INDEX.

Page

Argument. 13
Assignments of Error 11
Certificate of Agent of State Land Board..... 9
Contract Between United States and State of Idaho..... 6
Excerpt Opinion State Supreme Court Construing Tax Law 11
Federal Statutes, "Carey Act"..... 3
Idaho Law Accepting "Carey Act"..... 5
Statement of Case..... 3

CASES CITED.

Central Colorado Improvement Co. vs. Board of County Commissioners of Pueblo County, 95 U. S. 259, 24 L. Ed. 495 13
Hussman vs. Durham, 165 U. S. 144, 41 L. Ed. 644..... 13
Kansas Pacific Railroad Co. vs. Prescott, 83 U. S. 603, 21 L. Ed. 373, 16 Wall. 603 13
McCullough vs. Maryland, 4 Wheat, 316, 4 L. Ed. 579..... 13
McDaid vs. Territory of Oklahoma, 150 U. S. 209, 37 L. Ed. 1055 14
Sioux City & St. Paul R. Co. vs. United States, 159 U. S. 350, 40 L. Ed. 177..... 15
Tucker vs. Ferguson, 89 U. S. 527, 22 L. Ed. 805, 22 Wall, 527 13
Union Pacific Railroad Co. vs. McShane, 89 U. S. 444, 22 L. Ed. 747, 22 Wall. 444..... 13-19

STATEMENT.

This action was commenced in the District Court for Bingham County, State of Idaho, to restrain the collection of state and county taxes levied upon land prior to the issuance of patent to the plaintiff in error. The case was submitted upon an agreed statement of facts, which the trial court adopted as its findings. Judgment was entered in favor of the defendants and against the plaintiff, holding the land subject to taxation and the tax lien valid. (Tr. 1-20.) Upon appeal to the Supreme Court of the State of Idaho, the judgment below was affirmed, and the case is brought here upon writ of error. (Tr. 24.) The premises in question are embraced within a tract of approximately fifty thousand acres of land, segregated by the United States under the provisions of the acts of Congress, commonly known as the "Carey Act." 28 Stat. L. 422, 6 Fed. Stat. Ann. 397-399, and the acts amendatory thereof, 29 Stat. L. 434, 31 Stat. L. 1188, and Chapter 5, Title 9, of the Idaho Revised Codes, 1907, accepting the conditions of such acts of Congress, and the various contracts made pursuant to said statutes. (Tr. 1-4.) The jurisdiction of this court is predicated upon Section 237 of the Judicial Code. The judgment of the highest court of the State denied rights claimed under the following Federal Statutes:

> Sec. 4. (Grant to States irrigating desert lands.) That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State, to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled "An Act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven and the act amendatory thereof approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the pas-

sage of this Act, as thoroughly as is required of citizens who may enter upon the said desert land law. (28 Stat. L. 422.)

(Plan of irrigation to be filed—contracts for reclaiming and settlement.) Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement. (28 Stat. L. 422.)

(Patents for reclaimed land—limit to one person—surplus from sale.) As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of land to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. (28 Stat. L. 422.)

Sec. 1. (Lien for expenses of reclaiming lands—patents to issue when.) That under any law heretofore or

hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an Act entitled "An Act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part. (29 Stat. L. 434.)

That portion of the Idaho law accepting the conditional grants, bearing upon the questions presented by the record in this case, is as follows:

> Sec. 1613. The State of Idaho hereby accepts the conditions of Section 4 of an act of Congress, entitled, "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, A. D. 1894, together with all the grants of land to the State under the provisions of the aforesaid act. The selection, management and disposal of said land shall be vested in the State Board of Land Commissioners, as constituted by Section 7 of Article 9 of the Constitution of the State of Idaho. Said State Board of Land Commissioners shall be hereinafter designated as the "board."

Pursuant to these statutes, the United States and the State of Idaho entered into a contract for the segregation of approximately fifty thousand acres of land. The contract appears as one of the allegations in the complaint, but because

of its direct bearing upon the questions presented, and for the convenience of the court, we set it out in full.

These Articles of Agreement, made and entered into this 19th day of July, A. D. 1899, by and between E. A. Hitchcock, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and Frank Steunenberg, for and on behalf of the State of Idaho, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter named, and of the fact that the State has, under the provisions of Section 4 of Act of Congress, approved August 18th, 1894, through Frank Steunenberg, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character, and particularly described as follows, to-wit:

Herein follows a description of the segregation by legal subdivisions and includes a total of 51,178.45 acres, in which list of lands is included, the Northwest Quarter of the SE¼ and the NE¼ of the SW¼ and Lot 4, being the SW¼ of the SW¼ and SE¼ of the SW¼ of Section 18, Twp. 4 S, R. 33 E., B. M., being the land of plaintiff hereinafter described, and after said description of land said contract continues as follows:

"And has filed a map of said lands, and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed, and the source of water to be used for that purpose, the said party of the first part contracts and agrees, and by and with the consent and approval of William McKinley, President thereof, hereby binds the United States of America, to donate, grant and patent to said State, or to its assigns, free from cost for survey and price, such parts of said lands as said State or its assigns may cause to be irrigated, reclaimed, occupied and cultivated, in accordance with the provisions of said Act of Congress, and with the regulations issued thereunder and with the terms of this contract, any time prior to the 18th day of August, 1904.

It is further understood, that said State shall not lease any of said lands or use or dispose of the same in any way whatever except to secure their reclamation, cultivation and settlement; and in the selling and disposing of them for that purpose, the said State may sell or dispose of not more than 160 acres to any one person and

then only to bona fide settlers who are citizens of the United States, or who have declared their intention to become such citizens, and it is distinctly understood and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said Act of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed, that said State shall have full power, right and authority to enact such laws, and from time to time to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation, reclamation, settlement and cultivation thereof as is required by this contract and the said Act of Congress; but no such law, contract or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said Act of Congress, and then only after the requirements of said Act and contract have been fully complied with.

Neither the approval of said application, map and plan, nor the segregation of said land, by the Secretary of the Interior, nor anything in this contract, or in the said Act of Congress, shall be construed as to give said State any interest whatever in any lands upon which there may, at the date of this contract, be an actual settlement by a bona fide settler, qualified under the public land laws to acquire title thereto; nor to any lands which are, in fact, non-desert in character, and not subject to entry under the desert land laws of the United States; and any person may at any time before said State shall have finally disposed of the same, institute a contest before the register and receiver of the district in which said land is situated, upon an allegation that any quarter section of said land is non-desert in character.

It is further understood and agreed, that as soon as any of said lands may be irrigated and reclaimed as thoroughly as is now required of citizens to enter lands under the desert land laws, and are occupied by actual bona fide settlers, who have cultivated twenty acres of the tracts upon which they have settled, the said State or its assigns

may make proof thereof under and according to such rules and regulations as may be prescribed thereof by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, the patent shall issue to said State or its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing, and any surplus then remaining after the payment of the costs of such reclamation, shall be held as a trust fund to be applied under the direction of the Secretary of the Interior to the reclamation of other desert lands within said State.

The said second party agrees that an accurate account shall be kept of all moneys received by said State from the sale of said lands, and of the money expended by it in the reclamation thereof, and shall from time to time render an accurate statement thereof to the Secretary of the Interior, whenever required by him so to do.

And it is further stipulated, that as soon as said surplus shall have been ascertained, and the amount of said trust fund finally declared, it shall be deposited by the said State in some United States Depository, where it shall remain until it shall be withdrawn for the purpose of reclaiming other lands, as hereinbefore provided.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioners of the General Land Office and the other shall be placed of record and remain on file with the proper officers of said State, and it shall be the duty of said State to cause a copy thereof, together with a copy of all rules and regulations issued thereunder, or under said Act of Congress, to be spread upon the deed records of each of the counties of said State in which any of said lands shall be situated.

In testimony whereof, the said parties have hereunto set their hands, the day and year first above written.

E. A. HITCHCOCK,
Secretary of the Interior.
STATE OF IDAHO,
By FRANK STEUNENBERG,
Governor and Chairman State Board Land Commissioners."

On the 23rd day of February, 1901, the State of Idaho entered into a contract with the American Falls Canal & Power Company for the construction of the canal system proposed for the irrigation of the lands segregated, and in consideration of the construction of the canal system, it authorized the American Falls Canal & Power Company to sell water rights in the canal system for the irrigation of the segregated lands.

Prior to May 15th, 1909, plaintiff in error, being a qualified Carey entryman, made settlement upon a part of the segregated lands, particularly described in the complaint, and at the same time entered into a contract for the purchase from the American Falls Canal & Power Company of water rights sufficient for the irrigation of the land entered. On May 15th, 1909, plaintiff submitted evidence of the cultivation and irrigation of the land entered to one Lorenzo R. Thomas, designated as "Agent of State Land Board," and on June 25th, 1909, plaintiff received the following certificate:

"Entry No. 311.

Blackfoot, Idaho, May 15, 1909.

It is hereby certified that under the provisions of an Act of the Legislature of the State of Idaho, approved March the 2nd, 1899, entitled an Act providing for a State Engineer and to provide for the acceptance by the State of Idaho, from the United States, of certain lands and to provide for the reclamation, occupation and disposal of the same, commonly known as the "Carey Act," and the Acts of the Legislature amendatory thereof, Glen R. Bothwell, whose post office address is Springfield, Idaho, before me on this 15th day of May, 1909, appeared and submitted evidence of the reclamation, cultivation and settlement of entry No. 311 embracing the NW¼ of the SE¼ and the NE¼ of the SW¼ and Lot 4, being the SW¼ of the SW¼ and the SE¼ of the SW¼ of Section 18, Twp. 4 S., R. 33 E., B. M., containing 150.64 acres, and has paid to the State of Idaho, through me, the sum of $40.00, being at the rate of twenty-five cents per acre, being in full payment of said land.

(Signed) LORENZO R. THOMAS,
Agent State Land Board."

"This is to certify that the reclamation, cultivation and settlement of the land embraced in entry No. 311 referred to in the above certificate has been examined and

has been hereby approved this 25th day of June, 1909, by order of the State Board of Land Commissioners.

(Signed) M. I. CHURCH, Register." (Tr. 6.)

After receiving the above certificate, plaintiff submitted no other proof and performed no act by way of making proofs to the Interior Department, or to its agent, or to any other person whatsoever, and neither the proof submitted on May 15th, 1909, nor any other proof of the irrigation or cultivation of the particular tract of land entered by him, was ever submitted by the State, or any of its officers or agents, or any other person, to the Interior Department, or to its officers or agents. (Tr. 14.)

In January, 1910, the State applied to the Interior Department for a patent to all the lands embraced in what was termed "Lists for Patent No. 5," which included the major portions of the lands in the segregation made by the Government to the State of Idaho July 19th, 1899. The State offered in support of said application for patent certain proofs that "an ample supply of water had been actually furnished in a substantial ditch or canal" to reclaim said lands. The Secretary of the Interior, after consideration, held the proofs offered on behalf of the State insufficient, rejected its application for patent, and at the same time notified the State that its contract of segregation with the United States would be cancelled, and that all lands embraced in said segregation, including the lands of the plaintiff in error, would be restored to the public domain for entry and settlement under the public land laws, because the State had not complied with its contract with the United States. (Tr. 15.)

In October, 1910, the State asked leave to renew its application for patent to said lands, and upon leave being granted submitted proof that it had done, or caused to be done, further and additional work; that it had taken further and additional action "to cause an ample supply of water in a canal or ditch" to be furnished for the reclamation of said lands, in accordance with the requirements of said Carey Act. The Secretary of the Interior received and examined proof in support of the proposition that the canal system had been properly constructed and an ample supply of water furnished, and on December 21st, 1910, clear-listed all of the lands embraced in said list for patent No. 5, comprising about forty-nine thousand acres. No proof was submitted to the Interior Department of

the cultivation, irrigation and settlement of any particular tracts of land covered by "Lists for Patent No. 5."

On January 9th, 1911, the United States issued its patent No. 168495 to the State for all of the lands embraced in said list. A large amount of the land included in the blanket patent had never been settled upon, occupied or cultivated by any settler. The patent was issued pursuant to the terms of the amendment to the Carey Act of June 11th, 1896, and the specific requirements of Section 4 of the original act, respecting the settlement by bona fide settlers and the irrigation and reclamation of the individual tracts, was wholly disregarded in issuing the patent.

The patent dated January 9th, 1911, was recorded in the General Land Office, transmitted to the State of Idaho, and received and recorded in Bingham County, January 18th, 1911. (Tr. 16.) On February 10th, 1911, the State executed its patent to plaintiff for the particular land entered by him and described in the certificate issued June 25th, 1909. (Tr. 17.)

The Supreme Court of Idaho, construing its tax law, in this case said: "Under the statute of this State, Section 1653, Revised Codes, a tax lien attaches against any taxable property within the State at noon the second Monday in January, 1911. The second Monday in January, 1911, was January 9th, and this is the same day which the patent from the United States to the State of Idaho issued for this body of land." (Tr. 27.)

At noon on the 9th day of January, 1911, the defendants in error attempted to assess plaintiff's land and to levy the taxes in question.

Plaintiff in error makes the following assignments:

ASSIGNMENTS OF ERROR.

The Supreme Court of Idaho erred in holding and deciding:

First: That the judgment and decree of said District Court be affirmed in which and by which it was held and decided that plaintiff's land became liable for state, county, and school taxes at noon of January 9th, 1911, that such taxes were a valid first lien against said lands after said time; that plaintiff's bill to enjoin and restrain their collection and a sale for the same, was without equity, and should be dismissed, and in dismissing plaintiff's bill; said Supreme Court should have reversed said judgment and decree of the lower court.

Second: That the levy of taxes against said lands and sale of the same for said taxes did not violate Section 4 of an Act of Congress, approved August 18th, 1894, entitled: "An Act making appropriations for sundry civil expenses for the government for the fiscal year ending June 30th, 1894, and for other purposes." (28 Stat. L. 422.) (Fed. Stat. Anno. Vol. 6, 397) and the amendments thereto of June 11th, 1896, 29 Stat. L. 434), and of March 3, 1901, (31 Stat. L. 1188), said acts of Congress being commonly known and designated as the "Carey Act."

Third: That Section 1653, Idaho Revised Codes, 1908, created a first lien for state, county and school taxes against said lands on January 9th, 1911, at noon of said day, and in not holding and deciding that such a construction would cause the state law to be in violation of said acts of Congress, and also of the 14th Amendment to the Constitution of the United States, and would be taking property without due process of law, and in violation of the terms of the grant of said lands to the state.

Fourth: That the State of Idaho may levy a tax or create a tax lien upon and against said lands segregated to a state under the provisions of said "Carey Act," while the title remains in the United States, or the state, in trust for actual settlers.

Fifth: That public lands of the United States segregated to a state, under the provisions of the "Carey Act," may be taxed by the state at any time after the settler on such lands has submitted proof, to the State, of his settlement and reclamation.

Sixth: That plaintiff in error was vested with a complete indefeasible title to said lands, immediately upon the submission and acceptance of his proof of settlement and reclamation to the State Land Board in June, 1909.

Seventh: That the taxing of said lands and the sale of the same under said tax lien does not impair the obligation of the State's contract with the United States, made on the 19th day of July, 1899, by which it obligated itself not to create any lien upon said lands, or to dispose of the same for any purpose, except, to secure their reclamation, cultivation and settlement.

Eighth: That said Section 1653, as applied to this plaintiff, did not abridge the privileges and immunities of citizens or of this plaintiff, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Ninth: That the acts of the defendants in taxing plaintiff's "Carey Act" lands was not a taking of plaintiff's property without due process of law, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

Tenth: That Section 1653, as applied to this plaintiff, did not impair the obligation of contracts, contrary to the provisions of Article 1, Section 10 of the Federal Constitution.

Eleventh: That plaintiff's lands were subject to an assessment and levy of taxes by the defendants for state, county and school purposes prior to the execution and delivery to plaintiff by the State of Idaho of a patent conveying said lands.

ARGUMENT.

Section 4, Article 7, of the Constitution of the State of Idaho, provides: "That the property of the United States, the State, counties, towns, cities and other municipal corporations, and public libraries, shall be exempt from taxation." This constitutional provision but affirms the law of the United States.

McCullough vs. Maryland, 4 Wheat 316, 4 L. Ed. 579;
Van Brocklin vs. Anderson, 117 U. S. 151, 29 L. Ed. 845.

The principle is qualified, however, to the extent that where the United States holds only the naked legal title to the land and the full *equitable title has passed by the performance of every act going to the foundation of the right,* the land is subject to State taxation.

Kansas Pacific Railroad Co. vs. Prescott, 83 U. S. 603, 21 L. Ed. 373, 16 Wall. 603;
Union Pacific Railroad Co. vs. McShane, 89 U. S. 444, 22 L. Ed. 747, 22 Wall. 444;
Central Colorado Improvement Co. vs. Board of County Commissioners of Pueblo County, 95 U. S. 259, 24 L. Ed. 495;
Hussman vs. Durham, 165 U. S. 144, 41 L. Ed. 644.

It follows that if, as in this case, the United States conveys land to a State in trust for a specific purpose, something more than a mere naked title is retained until the trust is

fully executed by the trustee. Every act going to the foundation of the right is not performed until the trustee divests itself of the trust property, and in this case it could be done only by the issuance of patent.

In Tucker vs. Ferguson, 89 U. S. 572, 22 L. Ed. 805, Mr. Justice Swayne, delivering the opinion of the court, says:

> "The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in anywise abdicate her sovereignty by accepting the trust. But the former might be exercised to render more effectual the discharge of the latter. She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

The issuance of the patent by the United States to the State of Idaho did not terminate the control over the land by the United States. By the terms of the grant its control was continued until actually disposed of by the issuance of the patents to the individual entrymen. While it continued to hold the title in trust, appeals to the Interior Department might have been made by the entrymen, and during the course of such appeals, action by the State Land Board, acting for the trustee, would have been stayed.

McDaid vs. Territory of Oklahoma, 150 U. S. 209, 37 L. Ed. 1055.
Sioux City & St. Paul R. Co. vs. United States, 159 U. S. 350, 40 L. Ed. 177.

The rule that the issuance of a final receipt in homestead and desert land claims, brings the land covered within the class of property subject to taxation by the State, has no application in this case, because by the grant a trust was created with the State as trustee, and by the term of the trust, no individual entryman is entitled, as a matter of right, to a patent until the trust is fully executed.

The requirements of the statute and the contract that an ample supply of water is actually furnished in a substantial ditch or canal, and the particular requirements of each individual entryman must concur before an entryman can have any claim whatever to patent. Moreover, proof of the concurrence of those things is required to be submitted to and examined and found to be satisfactory by the Secretary of the Interior or his agent, before the right to a patent can be complete. Such a finding goes to the foundation of the right. We direct the court's attention to the following provisions of the statute:

> "The Secretary of the Interior is authorized * * * to contract and agree * * * to donate, grant and patent to the state * * * such desert lands * * * as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers."
>
> "That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section, but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.
>
> "As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of such lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state, or its assigns, for said lands so reclaimed and settled, provided that said State shall not sell or dispose of more than one hun-

dred sixty acres of such land to any one person. * * *"

* * * "A lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such State without regard to settlement or cultivation."

This provision of the amendment to the law was clearly intended to authorize the creation of a lien for the expenses of constructing the canal, and was not intended to dispense with the requirements of the original act respecting settlement, cultivation and irrigation, together with proof of those things. That was the view of the Secretary of the Interior, approved by the President, at the time of the execution of the contract, for those provisions were continued in the contract, and it was further provided that:

"All persons acquiring title to said lands from said State, prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress, and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands," and

"As soon as any of said lands may be irrigated and reclaimed as thoroughly as is now required of citizens who enter lands under the Desert Land Law and are occupied by actual bona fide settlers, who have cultivated twenty acres of the tracts upon which they have settled, the said State or its assigns may make proof thereof under and according to such rules and regulations as may be prescribed thereof by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, patent shall issue to said State or to its assigns for the contracts included in said proofs."

No proof of reclamation was ever submitted by plaintiff in error to the Secretary of the Interior, or by one authorized by him to receive and accept the same.

The State court was content to rest its decision upon the so-called final certificate, issued June 25th, 1909, notwithstanding the Secretary of the Interior rejected the proof offered by the State, and threatened to cancel the contract and throw all the land open to entry. The court recognized the necessity of the submission, examination and approval of the proof, but seemed to assume that the State Land Board was the body authorized to receive and pass upon the evidence of cultivation and irrigation. The contract, by providing that "All persons acquiring title to such land from said State *prior to the issuance of patent, as hereinafter mentioned,* will take the same subject to the requirements of the Act of Congress," clearly left it with the Secretary of the Interior to accept or nullify any proof theretofore made to the State Land Board, if indeed that Board ever had any authority to receive and pass upon the proof.

The action of the Secretary of the Interior respecting the proof would seem to end all controversy as to the force or effect of the final receipt. Moreover, it is submitted that the requirements of the submission of proof by the State or its assigns, clearly indicate an intention on the part of the Interior Department to require the submission of proof to it, and not by the individual land claimant to the State. It is simply the case of one of the contracting parties requiring the submission to it of proof of the performance of the contract by the other party, or its assigns. If we are correct in this interpretation of the contract, then it follows that no proof was ever made to the Secretary of the Interior, and consequently the trust was not executed, and the plaintiff in error was never entitled, as a matter of right, to the patent to the land. It is not material that all these questions were apparently concluded by the actual execution and delivery to plaintiff of the patent by the State and the acquiescence of the Interior Department.

Even though the State was authorized, after the issuance of patent to it, to receive and examine the proof, there was never a time, at least before the actual issuance and delivery of patents to the claimants, that it was not only its right, but its duty to challenge the sufficiency of the reclamation of the land or its occupation by the actual settlers under the terms of the

statutes and the contract. In the performance of this duty, neither the State nor its officers or agents could ever estop it from requiring a full compliance with the law. The utmost good faith was required at the hands of the State, and consequently it must not be presumed that the State deliberately disqualified itself from executing the trust, by itself taking a position that would compel it to issue the patent, regardless of a full and complete compliance with the terms of the trust, or to retain the trust property encumbered with a tax lien in favor of itself as trustee. If in the judgment of the officers of the State, full and complete compliance with the requirements of the statute had not been made by the land claimant, it would have been the duty of the State to refuse the patent, and in doing so, if the tax is valid, it would have left the lands burdened with a tax lien for general State purposes.

Moreover, the doctrine of relation has no such application as would justify the court in holding that the proof made on May 15th, 1909, should be considered as if made after the land had been clear-listed for patent, because the statute and the contract contemplate the actual and bona fide settlement, cultivation and irrigation of the land at the time the patent issues. There is no presumption that the settlement, cultivation, irrigation and reclamation made up to May 15th, 1909, continued after that season, or that there was in 1911 a concurrence of all acts required both of the State and of the individual settler, justifying the issuance of a patent. Proof of the continuation of such settlement as was made in 1909 was required. It is common knowledge in the arid region that land once irrigated and reclaimed, upon abandonment, either of the land or of the irrigation works, at once reverts to its native desert state.

The amendment to the Act clearly negatives the right to load the land, conveyed to the State in a body, with a tax lien and thereby defeat the express terms of the statute, which requires: "Any surplus of money derived by any State from the sale of said land, in excess of the cost of the reclamation, to be held by it as a trust fund."

There is no guide except the actual issuance of the patent for any assessor in determining which land of the entire tract, covered by the Federal patent of January 18th, 1911, shall be assessed and taxed and which shall not. If he had the power to assess land which he thought would be patented in February, he might have, with equal authority, assessed land which he thought would be ready for patent in March, April,

or any other month of the year. The State, by permitting such assessments, would either take from the Secretary of the Interior the important function of determining the sufficiency of the proof of reclamation and settlement of any given tract of land, or take the risk of being put in the embarrassing position of continuing a tax lien upon the trust property. Such an awkward position is avoided by the assessor assessing land in the name of the person in whom the title stands on the second Monday in January, as required by the statute.

Whether the land came within the class of property subject to taxation during the year 1911, is determined as of the date of January 9th, 1911, when the tax lien attached.

The Supreme Court of the State, while holding that the lien attached as of the 9th day of January, 1911, took the position that it was not concerned with the question of the effect of the tax lien in the event the State failed for any reason to issue the patent to the plaintiff, or of the right of the State to thereafter sell for taxes. (Tr. 29.)

Mr. Justice Miller, delivering the opinion of this Court in Union Pacific Railroad Company vs. McShane, 89 U. S. 444, 22 L. Ed. 747, 22 Wall. 444, said:

> "The United States retains the legal title by withholding the patent for the purpose of securing the payment of these expenses, and it cannot be permitted to the States to defeat or embarrass this right by the sale of the land for taxes. If such a sale can be made, it must be valid, if the land is subject to taxation and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax, and the Treasurers of the counties have no right to assess it for that purpose. But when the United States parts with her title, she has parted with the only means which that section of the statute gives for securing payment of these costs."

It may with equal force be said that the United States, or the State of Idaho, as its trustee, by the contract, withheld the title until all the things required to constitute reclamation of the land had been done. When the State, as such trustee, parted with the title by the issuance of the patent, it parted with the only means it had of securing the reclamation of the

land by actual settlement, and of preventing the land from going into the hands of speculators. A sale for taxes would have dispensed with the submission of proof of cultivation and reclamation to the Secretary of the Interior, in direct violation of the terms of the contract, and would otherwise have violated the contract, because such a sale would not have been "to aid the public land States in the reclamation of the public lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers," but would have been simply to increase the tax receipts of the State, and the State would thereby "dispose of the same in a way other than to secure their reclamation and cultivation and settlement" in tracts perhaps of more than one hundred sixty acres to one person, and to individual or corporation tax title buyers, and not to bona fide settlers. Moreover, the proceeds from such sale would not be held "in a trust fund to be applied under the direction of the Secretary of the Interior to the reclamation of other desert lands within said State," and of course the State could not have kept "an accurate account" of the moneys received from the sale of the land to be expended in the reclamation of other land.

The Supreme Court of Idaho misconceived the law, when it treated this as a moot question.

It is respectfully submitted that the judgment is erroneous and the case should be reversed with directions to grant the injunctive relief prayed for.

JEDEDIAH D. SKEEN,
WILLIAM H. WILKINS,
Attorneys for Plaintiff in Error. Residence: Salt Lake City, Utah.

WILLIAM A. LEE,
Attorney for Plaintiff in Error. Residence: Blackfoot, Ida.

EDWARD B. CRITCHLOW,
Of Counsel. Residence: Salt Lake City, Utah.

IN THE

Supreme Court of the United States

GLEN R. BOTHWELL,
Plaintiff in Error,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX-OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO,
Defendants in Error.

UNITED STATES OF AMERICA,
STATE OF IDAHO,
COUNTY OF ADA, } ss.

E. G. Davis, being duly sworn, on his oath deposes and says that he is Assistant Attorney General of the State of Idaho and one of the attorneys of record for defendant herein. That he resides at Boise, Idaho, and that W. A. Lee, leading counsel for the plaintiff in error resides at Blackfoot, Idaho; that between Boise, Idaho, and Blackfoot, Idaho, there is a daily mail, and that on the 25th day of February, 1915, this affiant deposited in the United States registered mail at Boise, Idaho, addressed to said W. A. Lee, a copy of the brief of defendant in error in the above entitled action.

Further affiant sayeth not.

(Sgd.) E. G. DAVIS,
Assistant Attorney General of the State of Idaho, and
Attorney for Defendant in Error.

Subscribed and sworn to before me this 25th day of February, 1915.

(Sgd.) I. W. HART,
Clerk of the Supreme Court.

[SEAL]

IN THE

Supreme Court of the United States

GLEN R. BOTHWELL,
Plaintiff in Error,

vs.

BINGHAM COUNTY, STATE OF IDAHO; HEBER C. C. RICH, ASSESSOR AND EX-OFFICIO TAX COLLECTOR FOR BINGHAM COUNTY, STATE OF IDAHO,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case involves the right of Bingham County, one of the counties of the State of Idaho, to assess for taxation in the year 1911 a certain tract of land belonging to the plaintiff in error.

Under the federal statute known as the Carey Act (28 Stat. L. 422 and as amended by 29 Stat. L. 434), the Secretary of the Interior for and on behalf of the United States on the 19th day of July, 1899, entered into a contract with the State of Idaho for the segregation and irrigation of certain land in the State of Idaho, aggregating some 51,187.45 acres. This contract is set out in full in transcript, pages 2, 3 and 4. Under the authority of the said federal statute, and in pursuance of the contract made with the federal gov-

ernment, the State of Idaho on February 23, 1901, entered into a written contract with the American Falls Canal & Power Company for the construction of the works necessary to divert water for the irrigation of the lands segregated as above indicated. (Tr. f. 8, pp. 4-5.)

Included within the lands so segregated was a tract of 150.64 acres described as the NW¼ of SE¼ and the NE¼ of SW¼ and lot 4, being the SE¼ of SW¼ and the SW¼ of SW¼ of Sec. 18, Twp. 4 S. R. 33 E. B. M., which the plaintiff in error, Glen R. Bothwell, long prior to June 1909, made application to the State of Idaho in the manner prescribed by law to enter, and for which he paid the prescribed fee of twenty-five ecnts (25c) per acre. (Tr. f. 26½ p. 15.)

On May 15, 1909, the plaintiff in error appeared before Lorenzo R. Thomas, an agent of the State Board of Land Commissioners of the State of Idaho, at Blackfoot, Idaho, and made proof as required by law of such settlement and cultivation as entitled him to receive from the State of Idaho patent for his said land, and at the same time made the final payment of twenty-five cents per acre, and all other charges and fees required to be paid as a preliminary requisite to the issuance of patent. The said proof so offered was accepted by the State Board of Land Commissioners on the 25th day of June, 1909, and a final certificate of entry issued. (Tr. f. 27, p. 16.)

It is conceded in the stipulation of facts that no further payment by plaintiff was required, and that no further act remained to be performed with reference to the entry in question prior to the issuance of patent to the State of Idaho, and to the plaintiff in error, and that he was not thereafter required to make any further payment or perform any further act with reference to the said entry before obtaining patent therefor. (Tr. f. 27 p. 16.)

On December 21, ~~1911~~ 1910, upon a showing made to the Department of the Interior which the said Department considered satisfactory, the Secretary of the Interior clear listed "list for patent No. 5" for patent to the State of Idaho, which included the lands of the plaintiff in error, above described, and on January 9, 1911, patent therefor was duly issued to the State of Idaho. (Tr. f. 29, p. 17.)

On February 10, 1911, the State of Idaho issued its patent to the plaintiff in error for the lands in question. (Tr. f. 30, p. 17.)

Section 1653, Revised Codes of Idaho (1909) as the same existed in 1911, provided in part as follows:

> "Sec. 1653. All taxable property shall be assessed in the county, city or district in which it is situated on the second Monday in January, or, if not within the State on that day, on the day of assessment; the assessor must, between the second Monday in January and the first day of July in each year ascertain the names of all tax-

> able inhabitants and all property in his county, subject to taxation, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock noon of the second Monday of January next preceding, or on the day of assessment as aforesaid; but no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid."

Under the authority of Sec. 1653, Revised Codes of Idaho (1909), the assessor and tax collector of Bingham County, Idaho, valued the lands, acquired as hereinbefore set out by plaintiff in error, at the sum of $3,880.00, and levied against the said lands an assessment of $36.86, the lien of which attached to the said lands under date of January 9, 1911, the very date on which the lands within the segregation in question were patented to the State of Idaho.

The sole question involved in this case is, therefore, the question as to whether the lands of plaintiff in error under the facts hereinbefore stated were properly taxed by the defendants in error for the year 1911.

ARGUMENT.

Plaintiff in error is estopped from asserting the insufficiency of the representations upon which he obtained title to his land.

It is evident at once that plaintiff's complaint is without equity, and it may well be questioned if it shows good faith since the plaintiff in error takes the

position of questioning in this proceeding the sufficiency of the very proof which he himself offered as sufficient to entitle him to the patent which was issued to him by the State of Idaho on February 10, 1911. (Tr. f. 26½, p. 15 and ff. 30-31, pp. 17-18.) Having obtained title to his land as a result of his showing that he had complied with both the laws of the United States and the State of Idaho with regard to settlement and cultivation, he will not be heard by this court to deny the sufficiency of such showing for the purpose of escaping his just share of the burdens of government.

> "One who by his acts or representations or by his silence when he ought to speak intends, or through culpable negligence induces, another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial."
>
> Kirk vs. Hamilton, 102 U. S. 68; 26 L. Ed. 79.

> "A railroad company which has assumed and exercised rights on an Indian Reservation which it could possess only by virtue of the consent of the Indians, cannot allege the want of such consent to escape taxation."
>
> Maricopa & P. R. Co. vs. Arizona, 156 U. S. 347; 39 L. Ed. 447.

> "A party is not permitted to contradict statements or admissions contained in pleadings or papers executed in judicial proceedings."

Sample vs. Barnes, 14 How. 70, 14 L. Ed. 330.

"One to whom a certicate of stock has been issued, and who has received a dividend is estopped from denying his ownership of it."

Sanger vs. Upton, 91 U. S. 56; 23 L. Ed. 220.

"Whether the exclusion was erroneously directed or not, we are not now called upon to determine, for the relator cannot be heard to insist that it was. The action of the court was in this particular exactly what he asked. He presented a petition asking that such property should be excluded from the levy, and he cannot now be permitted to complain in this court of an order made in the inferior court at his instance."

U. S. ex rel Brown vs. City of Memphis, 97 U. S. 284; 24 L. Ed. 937.

"At all events, it does not lie in the mouth of a party in equity to complain that the court assumed his pleadings made under oath to be true and decreed accordingly."

Cavender vs. Cavender, 114 U. S. 464; 29 L. Ed. 212.

"A party cannot allege as error the admission of evidence introduced by himself."

McGillin vs. Bennett, et al, 132 U. S. 445, 33 L. Ed. 422.

The question involved in this case is the date on which title to his lands, sufficient for purposes of taxation, passed to the plaintiff in error.

It is difficult to follow the somewhat involved and wholly illogical argument of counsel for plaintiff in

error, or to even hazard a guess as to which of the many assignments of error they intend their brief to relate. In assignments 8 to 10, inclusive, it is claimed that the attempt to tax the land of plaintiff in error for the year 1911 is in violation of the contract clause of the constitution of the United States, and an abridgment of the privileges and immunities of plaintiff in error, as well as a taking of his property without due process of law, but there is neither argument nor citation of authorities to support these contentions. We shall not consume the time of the court in arguing that these contentions have no merit, for this is self-evident. Taxes were levied against the particular property equally with all other property in the defendant county for the year 1911. There is no question of the regularity of the assessment, no question of its uniformity with other assessments in the same taxing unit, and no question of the right of the county to collect, in general, such taxes as were imposed on the property of the plaintiff in error. As a matter of fact, the only question to be determined is whether there had passed to the plaintiff in error, on or prior to the 9th day of January, 1911, such title to his land as would make the property taxable on that date. And even this question, the plaintiff in error is estopped from raising, as we have shown above, on the ground that his proof was insufficient, or that it was prematurely made, or made before the wrong parties.

The question of when a taxable title passed to the plaintiff in error, must be determined from a consideration of the language of the Carey Act, the facts in this particular case, and the general rules governing the passing of title under patents of the Federal Government.

The Carey Act as it was enacted in the year 1894 (28 Stat. L. 422) authorizes the Secretary of the Interior, with the approval of the President, to enter into a contract to donate to the public land states such desert lands not exceeding one million acres in each state "as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres in each one hundred and sixty-acre tract cultivated by actual settlers * * * as thoroughly as is required of citizens who may enter under the * * desert land law." With reference to the patenting of segregated Carey Act land, the federal statute, as originally enacted provided as follows:

> "As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the *State or its assigns* for said lands so reclaimed and settled."

To this part of the statute was added a proviso:

> "That said states shall not sell or dispose of more than one hundred and sixty acres of lands

> to any one person, and any surplus of money derived by the State from the sale of said lands in excess of the cost of their reclamation shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State."

The Carey Act as it was enacted in 1894, was amended in 1897 (29 Stat. L. 434) by a provision which authorized the public land states entering into Carey Act contracts to create a lien against such land "for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

It will be noted that the original act provided a method for obtaining patents only as fast as a State may furnish satisfactory proof that any of the segregated lands "are irrigated, reclaimed and occupied by actual settlers," patents in such cases to be issued either to the *State or to its assigns* for said lands so reclaimed and settled. The amending act in 1897 provided an additional method of acquiring patent from the federal government for segregated Carey Act land. This later act provided that,—

> "When an amply supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to *such State* without regard to settlement or cultivation."

Counsel for plaintiff in error attempt to make capital out of the fact that no proof of reclamation and

settlement by the plaintiff in error was ever submitted to the Secretary of the Interior, or to one authorized by him to receive and accept such proof. But it is clear that this point is not worthy of serious consideration. Under the Carey Act, as first enacted, the State might have furnished proof of settlement and reclamation by the plaintiff in error of his particular land, and thus obtained, either in its own name or in the name of plaintiff in error as its assign, a patent from the federal government for that particular tract of land. If the State should desire to obtain patent for the entire segregated area, it had authority to proceed under the Carey Act as amended in 1897 (29 Stat. L. 434), and by offering proof that it had "an ample supply of water * * * in a substantial ditch", secure from the federal government in its own name a single patent for the entire tract. The State of Idaho followed the latter method of making proof and in this way obtained from the federal government, on January 9th, 1911, a single patent in its own name for the entire tract of land which included the lands of the plaintiff in error. (Tr. ff. 28-29, pp. 16-17.)

It was never the intention of the Carey Act to require that individual settlers should make their proof direct to the Secretary of the Interior or to some one appointed by him for that purpose. The original act provided that "as fast as any *State* may make satisfactory *proof* * * * patents shall be issued to *the State*

or its assigns," and in the Act as amended in 1897 an entirely new and additional plan was provided for the patenting of these desert lands which provided for a showing *by the State* of the completion of a sufficient irrigation system and the obtaining of an ample supply of water, patents to issue *direct to the State* making the showing. Under the first plan, it is obvious that the State could not possibly make the proof to the Secretary of the Interior until the individual settlers on the land had made their proofs of settlement and reclamation to the State; and, under the second plan, the State being granted the patent for an entire tract, it is obvious that it would hold the same in trust for the settlers thereon, and that such settlers for the purpose of obtaining individual patents must make proof to the State of reclamation and settlement. It is too clear for argument that the State has an option as to the particular plan which it may adopt for the securing of patent, and it is also clear that the settler is given authority to make his proof of settlement and reclamation as soon as he desires after such reclamation and settlement have been completed, under such rules and regulations as may be established by the State, in pursuance of the federal statute prescribing the extent of the cultivation and settlement required.

The plaintiff in error, as shown by the record (Tr. f. 26½, p. 15), long prior to June, 1909, entered his land in question and on the 15th day of May,

1909, submitted proof to the agent of the State Board of Land Commissioners of the reclamation, cultivation and settlement of his entry. The extent of cultivation necessary to be shown in making such proof was, "not less than twenty acres of each one hundred and sixty acre tract * * * as thoroughly as is required of citizens who * * * enter under the * * * desert land law." This proof was accepted by the State Board of Land Commissioners, and a final certificate issued under date of June 25, 1909, at which time all remaining fees, charges, etc., were paid, and nothing remained to be done by the plaintiff in error prior to the receipt of his patent, and nothing was done thereafter by him prior to the receipt of said patent. (Tr. f. 27, p. 16.) In other words, as early as June 25, 1909, the plaintiff in error had made all payments, and had performed each and every act necessary to entitle him to a patent for his lands.

Having received such proof of reclamation and settlement by the plaintiff in error, it was competent for the State under the Carey Act as originally enacted (28 Stat. L. 422) to apply to the federal government for a patent for this particular tract, either in its own name or in the name of the plaintiff in error as its assign; or, under the Carey Act, as amended in 1897, the State had the option of waiting before applying for patent until "an ample sup-

ply of water was actually furnished in a substantial ditch," and then apply for a patent for the entire segregation. The latter method was adopted, and the patent secured, as hereinbefore indicated. It being admitted that at the time this patent was issued, the plaintiff in error had made all payments and performed all acts necessary to entitle him to patent (Tr. f. 27, p. 16), and the State having accepted the proof of reclamation and settlement, it is entirely clear that the plaintiff in error was on the day the patent was issued by the United States the equitable owner of his land, and that the naked legal title only was in the State of Idaho, as agent for the federal government in transferring patent to the plaintiff in error. This being true and the equitable title having passed to the plaintiff in error by the performance of every act going to the foundation of the right, the land was on that date subject to state taxation.

In connection with the proposition just stated, we desire to invite the attention of the court to the opinion of the Supreme Court of Idaho in this case as set forth on pages 27-28 of the transcript. The reasoning there given on the point here involved is, we believe, entirely correct and wholly unanswerable.

As authorities bearing on the point here at issue, we desire to make the following citations:

> "He who has the right to property and is not excluded from its enjoyment will not be permit-

ted to use the legal title of the government to avoid his just share of state taxation."

N. P. R. Co. vs. Patterson, 154 U. S. 130; 38 L. Ed. 934.

"When the full equitable title to public land has passed to a railroad company, and the government holds simply a naked legal title, such land is subject to state taxation."

Winona & St. P. Land Co. vs. Minnesota, 159 U. S. 526; 40 L. Ed. 247.

"When the full equitable title to public lands has passed from the government, even prior to the issue of patent the land is subject to state taxation."

Hussman vs. Durham, 165 U. S. 144; 41 L. Ed. 664.

"Taxation upon lands held under a final certificate, but for which a patent has not been issued, is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress", nor is it a tax upon the lands of the United States."

Carroll vs. Safford, 3 How. 441; 11 L. Ed. 671.

"The fact that a patent has not issued to a railroad for public lands, and that it does not appear that the lands are not mineral lands, does not prevent the passing of an equitable title which is subject to taxation."

N. P. R. Co. vs. Clark, 153 U. S. 252; 38 L. Ed. 706.

> "A patent for any part of the public lands when issued by the Land Department, acting within the scope of its authority, carries with it, when delivered and accepted by the grantee, the legal title to the land, and with it passes all control of the executive department of the government over the title."
>
> Moore vs. Robbins, 96 U. S. 530; 24 L. Ed. 848.

In conclusion, we beg leave to invite the attention of the court to the following recapitulation of essential points:

1. The plaintiff in error made his proof of reclamation and settlement before the agent of the State Board of Land Commissioners of Idaho on May 15, 1909, and at this time made full payment of all fees and charges for the land in question.
2. The proof so made was accepted by the State Board of Land Commissioners and a final certificate issued on the 25th day of June, 1909.
3. A patent for the tract of land within which the land of plaintiff in error is situated was issued to the State of Idaho on the 9th day of January, 1911.
4. On this same 9th day of January, 1911, a tax lien for state and county taxes attached to the lands of plaintiff in error.
5. On the 10th day of February, 1911, the State of Idaho issued to plaintiff in error its patent for the lands on which he had made final proof as above indicated.

We desire to suggest, moreover, that in view of the facts herein outlined, the prosecution of the writ of error in this case can serve no higher purpose than the raising of a federal question which is at best

more fictitious than real. For more than a year prior to the filing of the original complaint in this action, the plaintiff in error had been in possession of his patent from the State of Idaho The sufficiency of this patent has never been questioned and the plaintiff has never been disturbed in his possession or control of his property. He had enjoyed the possession of a full equitable title to his property from the 25th day of June, 1909, up to its assessment in 1911, but rather than pay the small sum of $36.86, which was determined to be his just share of taxation for the year 1911, he chose to incur the expenses of this litigation, and has sought to impose upon this august tribunal the duty of determining whether the fact that the patent, which was issued to the State of Idaho in trust for the plaintiff in error on January 9th, 1911, did not reach him, in the course of administration, until the 10th day of February, 1911, is sufficient to enable the plaintiff in error to avoid the payment of his taxes for that year.

We are firmly of the opinion that the court would be fully justified in declining to assume jurisdiction of this case, but in any event, it is clear, both on reason and authority, that the decision of the court below should be affirmed and the writ of error dismissed.

Respectfully submitted,

J. H. PETERSON,
Attorney General of the State of Idaho.
E. G. DAVIS,
Assistant Attorney General.
R. W. ADAIR,
Prosecuting Attorney of Bingham County
Attorneys for Defendant in Error.